Supreme Court, U.S.
FILED

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No. 94-. . . .

In The
SUPREME COURT OF THE UNITED STATES
October Term 1993

ENCORE SYSTEMS, INC.,
VANGUARD INDUSTRIAL PLASTICS, INC.,
and GEORGE R. LEES,

Petitioners,

v.

MICHAEL LADNEY,

Respondent.

PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

APPENDIX TO PETITION FOR WRIT OF CERTIORARI

Ernest I. Gifford
COUNSEL OF RECORD
Thomas Traian Moga
Gifford, Groh, Sprinkle,
Patmore & Anderson, P.C.
280 North Woodward Avenue
Suite 400
Birmingham, MI 48009-5394
(810) 647-6000
Attorneys for Petitioners

March 3, 1994

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UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

93-1232

MICHAEL LADNEY,

Plaintiff-Appellee,

v.

ENCORE SYSTEMS, INC.,
VANGUARD INDUSTRIAL PLASTICS, INC.,
AND GEORGE R. LEES,

Defendants-Appellants.

O R D E R

Dated: December 3, 1993

UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

O R D E R

Before MICHEL, Circuit Judge, LOURIE, Circuit Judge, and SCHALL, Circuit Judge.

A petition for rehearing having been filed, and SUPPLEMENT TO REHEARING having also been filed by the APPELLANT,

UPON CONSIDERATION THEREOF, it is

ORDERED that the petition for rehearing be, and the same hereby is, DENIED.

The mandate will issue December 10, 1993.

FOR THE COURT,
FRANCIS X. GINDHART, CLERK

Dated: December 3, 1993

by: /s/
Diane M. Frye
Chief Deputy Clerk

cc: ERNEST I. GIFFORD
ERNIE L. BROOKS

LADNEY V ENCORE SYS INC, 93-1232
(DCT - 89-CV-73762)

****
Note: Pursuant to Fed. Cir. R. 47.6,

this order is not citable as precedent.

It is a public record.
****

UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

93-1232

MICHAEL LADNEY,

Plaintiff-Appellee,

v.

ENCORE SYSTEMS, INC.,
VANGUARD INDUSTRIAL PLASTICS, INC.,
and GEORGE R. LEES,

Defendants-Appellants.

JUDGMENT

On APPEAL from the United States District Court for the Eastern District of Michigan

in CASE NO(S). 89-CV-73762

This CAUSE having been heard and considered, it is

ORDERED and ADJUDGED:

AFFIRMED-IN-PART, VACATED-IN-PART,

AND REMANDED

Issued as a Mandate: December 10, 1993

ENTERED BY ORDER OF THE COURT

DATED: October 28, 1993

/s/
Francis X. Gindhart, Clerk

ISSUED AS A MANDATE: December 10, 1993

UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

OPINION ANNOUNCING
JUDGMENT OF THE COURT

OPINION FILED AND JUDGMENT ENTERED:
October 28, 1993

The attached opinion announcing the judgment of the court in your case was filed today. The judgment was entered pursuant to Rule 36. The mandate will be issued in due course.

Each side shall bear its own costs.

Exhibits and visual aids shall be promptly retrieved by the party that lodged them with this court.

FRANCIS X. GINDHART
Clerk

cc: ERNEST I. GIFFORD
ERNIE L. BROOKS

LADNEY V ENCORE SYS INC., 93-1232
(DCT - 89-CV-73762)

NOTE: Pursuant to Fed. Cir. R. 47.6, this disposition is not citable as precedent. It is a public record. The disposition will appear in tables published periodically.

UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

93-1232

MICHAEL LADNEY,

Plaintiff-Appellee,

v.

ENCORE SYSTEMS, INC.,
VANGUARD INDUSTRIAL PLASTICS, INC.
and GEORGE R. LEES,

Defendants-Appellants.

DECIDED: October 28, 1993

Before, MICHEL, LOURIE, and SCHALL, Circuit Judges.

SCHALL, Circuit Judge.

DECISION

This is an appeal from a judgment of the United States District Court for the

Eastern District of Michigan, Southern Division, awarding damages of $2,250,000 to plaintiff-appellee Michael Ladney in his patent infringement and tortious interference suit against defendants-appellants Encore Systems, Inc., Vanguard Industrial Plastics, Inc., and George R. Lees (collectively "Encore"). The judgment was based upon an order for default judgment of liability against Encore and upon an order awarding damages on the tortious interference claim after applying the doctrine of collateral estoppel based on a state court damage award. We affirm-in-part, vacate-in-part, and remand.

DISCUSSION

I

This court has stated that it applies regional circuit law when reviewing Fed. R. Civ. P. 37(b) discovery sanctions. Tennant Co. v. Hako Minuteman, Inc., 878 F.2d 1413, 1416, 11 U.S.P.Q. 2d 1303, 1305 (Fed.Cir. 1989). Since this appeal comes from the Eastern District of Michigan, the law of the Sixth Circuit controls.

In the Sixth Circuit, discovery sanctions are reviewed only for abuse of discretion. Bank One of Cleveland, N.A. v. Abbe, 916 F.2d 1067, 1073 (6th Cir. 1990) (citation omitted). If a party has the ability to comply with a discovery order and does not, dismissal or default judgment is not an abuse of discretion. Id. However, dismissal or default judgment is a sanction of the last resort

that may be imposed only if the court concludes that a party's failure to cooperate in discovery is due to willfulness, bad faith, or fault. Id. Additional factors to consider in reviewing a district court's decision to impose sanctions under Fed. R. Civ. P. 37(b) include (1) whether the adversary was prejudiced by the defaulting party's failure to cooperate in discovery, (2) whether the defaulting party was warned that failure to cooperate could lead to default, and (3) whether less drastic sanctions were imposed or considered before default was ordered. Id.

During the course of litigation, Encore willfully and repeatedly violated discovery orders, and Ladney was prejudiced by Encore's failure to cooperate in the discovery process.

Encore prevented Ladney from inspecting the "Encore process" even though the magistrate judge had ordered the inspection and Ladney had agreed to cover the costs. This inspection was necessary for Ladney and his expert to determine whether Encore was sub-licensing the "Encore process" or the "Baxi process" and whether the related apparatus of the process infringed U.S. Patent No. 4,781,544. Encore had already conducted a demonstration of the process for the benefit of its own expert. Second, the magistrate judge had previously warned Encore that further noncompliance with discovery orders could result in case dispositive sanctions. Finally, in the past the district court had imposed less drastic sanctions, and it considered such

sanctions before ordering default judgment following the events of February 20, 1991.

In sum, applying the appropriate factors, we cannot say that the district court abused its discretion in ordering a discovery sanction of default judgment under Fed. R. Civ. P. 37(b)(2)(C) against Encore. Therefore, we affirm the order of default judgment of liability.

II

Michigan law controls the requirements of collateral estoppel. A federal court determines the preclusive effect of a prior state court judgment by applying the same doctrine of collateral estoppel as the state where the judgment was rendered. See Marrese v. American Academy of Orthopaedic Surgeons, 470 U.S. 373, 380 (1985). The Michigan Supreme Court has stated that "[c]ollateral

estoppel applies to preclude relitigation of issues actually determined by final judgment and essential to the judgment in a prior action between the parties." Amalgamated Transit Union, Local 1564 v. Southeastern Mich. Transp. Auth., 437 Mich. 441, 451, 473 N.W.2d 249, 253 (1991). Put another way, in order for collateral estoppel to apply in a subsequent proceeding, the issue in that proceeding must be identical to the issue determined in the prior action. Id.

In the prior action Ladney v. Baxi, No. 88 356292 CK, the Circuit Court for Oakland County, Michigan, entered judgment on September 5, 1991, in the amount of $2,250,000 against Baxi for breaching a license agreement. Ladney asserts that those damages are identical to the damages arising from his tortious interference

claim against Encore. The problem with this assertion is that the state court award was a general verdict for several breaches of contract, including some not within the scope of the tortious interference claim here. Moreover, the jury verdict form and judgment in Ladney v. Baxi do not explain how the jury allocated damages. In short, based upon the very limited record from Ladney v. Baxi that was considered by the district court, we simply cannot determine whether the damages which were found in the state court case were damages arising from the matters which were at issue in the district court litigation.

Thus, as a matter of law, we are not persuaded that the record adequately supports a finding of identity of issues for collateral estoppel to apply to

damages in this case. Therefore, we vacate the court's award of $2,250,000 and remand the case to the district court to determine damages.

UNITED STATES DISTRICT
EASTERN DISTRICT OF MI
SOUTHERN DIVISION

MICHAEL LADNEY,

Plaintiff,

Case

vs.

HON.

ENCORE SYSTEMS, INC., VANGUARD INDUSTRIAL PLASTICS, INC., GEORGE R. LEES, STORK PLASTICS MACHINERY V.B., and VERENIGDE MACHINEFABRIEKEN STORK N.V.,

Defendants.
_____/

ENTERED: January 20, 1993

JUDGMENT FOR PLAINTIFF

Based on the following:

1) Order Dismissing Defendants Stork Plastics Machinery B.V. and Verenigde Machinefabrieken Stork N.V. entered on December 10, 1990;

2) Order Accepting the Report and Recommendation of Magistrate Judge for Default Judgment against Defendants Encore Systems, Inc., Vanguard Industrial Plastics, Inc., and George R. Lees entered on February 3, 1992;

3) Order Denying Defendants Request for Reconsideration of February 3, 1992, Order entered on May 21, 1992;

4) Order Accepting the Report and Recommendation of Magistrate Judge on the Application of Collateral Estoppel to the Tortious Interference Claims Based on Judgment in Ladney v.

Baxi entered on January 15, 1993; and,

5) Order Granting in Part and Denying in Part Plaintiff's Amended Motion for Permanent Injunction entered January 20, 1993;

IT IS ORDERED AND ADJUDGED that judgment be entered in the amount of Two Million Two Hundred and Fifty Thousand Dollars ($2,250,000) in favor of plaintiff and against defendants Encore Systems, Inc., Vanguard Industrial Plastics, Inc., and George R. Lees, jointly and severally.

IT IS FURTHER ORDERED AND ADJUDGED that defendants Encore Systems, Inc., Vanguard Industrial Plastics, Inc., and George R. Lees, their officers, agents,

servants, employees, attorneys, or any of them, and all persons acting in concert or participation with defendants, or with any of the foregoing, be and hereby are permanently enjoined:

a) from infringing, either directly or indirectly, U.S. Patent No. 4,781,554;

b) from further interference with plaintiff's contractual rights under the License Agreement of November 5, 1986; and,

c) defendants shall file with the court and serve on plaintiff, within thirty (30) days after the date of entry of this order and judgment, a

report in writing under oath setting forth in detail the manner and form in which defendants have complied with these injunctive provisions.

IT IS FURTHER ORDERED AND ADJUDGED that the clerk serve a copy of this judgment, by United States mail, on counsel for plaintiff and defendants.

/s/
BARBARA K. HACKETT
United States District Judge

Dated: January 20, 1993

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

MICHAEL LADNEY,

Plaintiff,

Case No.
89-CV-73762-DT

vs.

HON. BARBARA K. HACKETT

ENCORE SYSTEMS, INC.,
VANGUARD INDUSTRIAL
PLASTICS, INC. and
GEORGE R. LEES,

Defendants. /

ENTERED: January 15, 1993

ORDER ACCEPTING MAGISTRATE JUDGE'S REPORT AND RECOMMENDATION ON PLAINTIFF'S MOTION FOR APPLICATION OF THE DOCTRINE OF COLLATERAL ESTOPPEL TO THE TORTIOUS INTERFERENCE CLAIMS BASED ON THE JUDGMENT IN THE COMPANION CASE OF LADNEY V. BAXI

Plaintiff has filed a motion requesting that defendants be precluded from relitigating the issue of damages based on the damage findings in the companion state court case of Ladney v. Baxi. The court has reviewed the file, record, and magistrate judge's

recommendation. Objections to that report have been filed within the established time period and have been considered. They are not supported by the record or law in this case.

IT IS ORDERED that the magistrate judge's report and recommendation is accepted as the findings and conclusions of this court.

IT IS FURTHER ORDERED for the reasons well developed by the magistrate judge that plaintiff's motion be granted and that judgment be entered also in this case in the amount of Two Million Two Hundred and Fifty Thousand Dollars ($2,250,000), thus imposing joint and several liability among and between all parties in privity in these related cause of actions.

/s/
BARBARA K. HACKETT
United States District Judge

Dated: January 15, 1993.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

MICHAEL LADNEY,

Plaintiff,

CIVIL ACTION NO. 89-CV-73762-DT

v

JUDGE BARBARA K. HACKETT
MAGISTRATE JUDGE CHARLES BINDER

ENCORE SYSTEMS, INC., VANGUARD INDUSTRIAL PLASTICS, INC. and GEORGE R. LEES,

Defendants.
_____/

MAGISTRATE JUDGE'S REPORT AND RECOMMENDATION ON PLAINTIFF'S MOTION FOR APPLICATION OF THE DOCTRINE OF COLLATERAL ESTOPPEL TO THE TORTIOUS INTERFERENCE CLAIMS BASED ON THE JUDGMENT IN THE COMPANION CASE OF LADNEY V. BAXI

ENTERED: 11/06/92

I. INTRODUCTION

Pending, pursuant to an Order of Reference, is plaintiff's motion requesting that defendants be precluded from litigating the issue of damages based on the damage findings in the companion state court case of Ladney v. Baxi. Oral argument was heard on October 14, 1992.

This lawsuit involves what has become known as the "Baxi Process" developed by Mr. Baxi, and patented under the title "Process of Injection Molding with Pressurized Gas Assist," U.S. Patent No. 4,935,191, issued on June 19, 1990. Pursuant to Fed. R. Civ. Pr. 37, United States District Judge Barbara Hackett has previously issued a default judgement against the defendants. The remaining issue therefore is that of damages. Plaintiff argues that defendants are precluded by the doctrine of collateral estoppel from relitigating the issue of those damages flowing from tortious infringement of contract because the issue was resolved in the Oakland County Michigan Circuit Court in a case entitled, Ladney v. Baxi.

Mr. Baxi granted an exclusive license for the "Baxi Process" in the non-western hemisphere to Mr. James W. Hendry on November 5, 1986. Mr. Hendry assigned his interest in the "Baxi Process" to Mr. Ladney on April 20, 1987. Subsequently, in 1988, Mr. Ladney learned that although Mr. Baxi had made improvements on the process, he would not disclose the improvements to Mr. Ladney. Ladney filed suit against Baxi on September 2, 1988, for breach of contract in the Oakland County Circuit Court.

In January of that year, Mr. Baxi entered into a two-year employment agreement with Encore Molding Systems Corporation through its President, George Lees. (Ex. 11, Pl. 197). Mr. Baxi became a 25% shareholder in Encore. Mr. Baxi also executed a license agreement to

Encore enabling Encore to use the "Baxi Process" and manufacture and produce products through Vanguard and any Lees Enterprises' subsidiary through the process. (Ex. 12, Pl. 197). The "Baxi Process" became known as the "Encore Process."

On April 26, 1989, plaintiff initiated this Federal Court action against Encore Systems, Inc., George R. Lees, Stork Plastics Machinery B.V. and Verenigde Machinefabrieken Stork N. V., alleging patent infringement. (Pl. 1). The two Stork defendants were dismissed pursuant to a settlement agreement.

In June 1989, Encore Molding Systems, Inc. licensed the "Encore Process" to Stork Plastics Machinery B. V., a Netherlands Corporation. (Ex. 6, Pl. 197). Similarly, on or about March

25, 1990, Encore Molding Systems, Inc. licensed the "Encore Process" to Soko Co., Ltd., a Japanese Corporation. As a result, plaintiff filed his first amended complaint in this action on May 2, 1990, adding the claims of tortious interference with contractual rights. (Pl. 70).

Meanwhile, in the state court action, Mr. Baxi moved to stay that proceeding pending the outcome of the federal action or alternatively to dismiss the state case for lack of jurisdiction. Defendant Baxi argued that the two cases were based on identical facts while plaintiff argued that the cases were different. Apparently the motion was never decided and the state court action proceeded to trial.

In the instant action, plaintiff, after filing a motion to

compel, deposed Mr. Lees on September 28, 1990, pursuant to a court order. Mr. Baxi was deposed on December 21, 1990, also pursuant to a court order. In November 1990, plaintiff received copies of three agreements entered between Mr. Baxi and Encore: the general agreement, the confidentiality agreement, and the license agreement. Plaintiff received documents on February 14, 1991, disclosing involvement with the Stork defendants in the "Baxi Process." Subsequently, due to defendants' willful failure to provide other required discovery in this action judgment was entered in plaintiff's favor. As mentioned, the only remaining issue before this Court is the amount of damages, if any, plaintiff should receive.

The Ladney v. Baxi lawsuit went to trial in Oakland County in April 1991. A jury found in favor of plaintiff and awarded damages in the amount of $2,250,000. (Ex. 4, Pl. 197). Judgment was entered on September 5, 1991. The judgment states that, "Mr. Baxi failed to cooperate with Mr. Ladney and/or Mr. Hendry in obtaining patent protection for any process license under the agreement in non-western hemisphere countries." Further, "Mr. Baxi breached the exclusive license under the agreement. . . by authorizing others to license the process in non-western hemisphere countries" and failing "to disclose the improvements he made at Encore" despite an obligation to do so under the agreement.

Plaintiff argues that defendants are precluded from litigating in this case the issue of damages for tortious interference because the judgment in the Baxi suit should apply to this cause of action as well. Plaintiff adamantly asserts that he does not, through this motion, seek a double recovery. Rather, he seeks only the application of the Baxi judgment to the damage award in this case.

II. **ANALYSIS**

The United States Supreme Court requires a federal court determining the preclusive effect of a prior state court judgment to apply the same doctrine of collateral estoppel as the state where the earlier judgment was rendered. Marrese v. American Academy of Orthopedic Surgeons, 470 U.S. 373, 384 (1985); McAdoo v. Dallas Corp., 932 F.2d 522 524 (6th Cir. 1991).

> Collateral estoppel bars the relitigation of issues previously decided where such issues are raised in a subsequent action by the same parties based upon a different cause of action. People v Watt, 115 Mich App 172, 175; 320 NW2d 333 (1982). Essentially, in order for collateral estoppel to apply, the same ultimate issues of the first action must be involved in the second action. The parties must also have had a full opportunity to litigate the ultimate issues in the first action.

Schlumm v. Terrance J. O'Hagan, P.C., 173 Mich. App. 345, 354, 433 N.W.2d 839 (1988).

Intertwined with the concept of identity of parties in Michigan's formulation of collateral estoppel is the principle of mutuality. Howell v. Vito's Trucking & Excavating Co., 386 Mich. 37, 191 N.W.2d 313 (1971). Mutuality exists where the person attempting to take

advantage of the prior judgment would have been bound by the judgment if it was decided unfavorably. Therefore, the application of the doctrine of collateral estoppel in Michigan requires (1) identity of the parties and (2) identity of the issues.

A. Identity of the Parties

Plaintiff contends that Mr. Lees, Encore and Vanguard's assumption and exercise of control over the Baxi lawsuit satisfies the identity of parties' requirement binding these defendants to the prior state court determination. Under Michigan law, substantial identity of the parties, not precise identity, is all that is necessary to satisfy this requirement. Local 98, Detroit, Mich. of United Ass'n. of Journeymen and Apprentices of Plumbing and Pipefitting

Industry of U.S. and Canada v. Flamegas Detroit Corp., 52 Mich. App. 297, 217 N.W.2d 131 (1974). A nonparty who actively participates in a prior lawsuit is bound by the judgment as though a party. Bousson v. Mitchell, 84 Mich. App. 98, 269 N.W.2d 317 (1978).

> A person who is not a party but who controls an action, individually or in co-operation with others, is bound by the adjudications of litigated matters as if he were a party if he has a proprietary or financial interest in the judgment or in the determination of a question of fact or a question of law with reference to the same subject matter or transaction.

Id. at 102, citing Restatement Judgments § 84.

The United States Supreme Court concluded that nonparties to a prior action have had a full and fair opportunity to litigate where they:

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

MICHAEL LADNEY,

Plaintiff, Case No. 89-CV-73762-DT

vs.

HON. BARBARA K. HACKETT

ENCORE SYSTEMS, INC.,
VANGUARD INDUSTRIAL
PLASTICS, INC.,
GEORGE R. LEES,

Defendants.
_____/

ENTERED: January 31, 1992

ORDER ADOPTING THE REPORT AND RECOMMENDATION OF THE MAGISTRATE JUDGE AND GRANTING PLAINTIFF'S MOTION FOR A DEFAULT JUDGMENT AS A DISCOVERY SANCTION

On March 15, 1991, Magistrate Judge Charles Binder filed a report and recommendation on plaintiff's motion for sanctions for defendants' refusal to provide discovery. The report and recommendation details the problems with discovery in this case. The parties had

agreed at a discovery status conference to inspection of a gas injection molding process, with costs of the inspection to be covered by plaintiff. Magistrate Judge Binder directed that the inspection be conducted within the next two weeks. The inspection was scheduled. The magistrate judge describes what happened at the inspection:

> At the appointed time, counsel for plaintiff, the expert, Mr. Hendry and Mr. Ladney appeared at the Encore facility for the purposes of inspection. Counsel for the defendant informed plaintiff's party that Mr. Lees would be delayed. In fact, he was, and Lees arrived approximately 15 minutes after the appointed time. At that point, all parties proceeded to the plant floor. As they approached the production area, it was noted that although some necessary components, including gas equipment, were present, the gas injection molding machine, a large apparatus, which included the parts at issue in this case, and without which a demonstration could not take

> place, was not in the plant. Plaintiff's party at that point refused to go further. Counsel and clients engaged in conversation. As it developed, the conversation took place at slightly different spots, counsel talking together in one area and approximately 15 feet away, the parties and Mr. Hendry were in a separate group. As counsel were talking among themselves, they noted increasingly heated exchanges between the parties. Mr. Ladney and Mr. Hendry, via affidavits, . . . state that there were threats of physical violence made by Mr. Lees to Mr. Ladney.

This was not, however, the first instance of obstruction of discovery by defendants in this case. In the report and recommendation, the magistrate judge stated that "[t]his case has been marked by some of the most protracted contentious discovery proceedings I have thus far witnessed in my years as a judicial officer." Defendants have twice previously been sanctioned for willful misconduct in the discovery process. The

magistrate judge concluded that this episode was another willful attempt to obstruct crucial discovery on the part of defendants and, in light of the history of the case, any sanctions less than case dispositive were no longer appropriate. The magistrate judge recommended, pursuant to Fed.R.Civ.P. 37(b)(2)(c), that plaintiff's motion for sanctions be granted and that a default judgment be entered.

Defendants filed objections to the report and recommendation. Plaintiff requested an opportunity to respond, which the court granted, and plaintiff has responded.

A review of a case dispositive report and recommendation of a magistrate judge is de novo. Local Rule C-4(b). Federal

Rule of Civil Procedure 37(b) provides in pertinent part:

> (2) If a party or an officer, director, or managing agent of a party . . . fails to obey an order to provide or permit discovery, including an order made under subdivision (a) of this rule or Rule 35, or if a party fails to obey an order entered under Rule 26(f), the court in which the action is pending may make such orders in regard to the failure as are just, and among others the following:
>
> > (C) An order striking out pleadings or parts thereof, or staying further proceedings until the order is obeyed, or dismissing the action or proceeding or any part thereof, or rendering a judgment by default against the disobedient party.

In Patton v. Aerojet Ordnance co., 765 F2d 604, 607 (6th Cir. 1985), the court stated:

> Dismissal of an action for failure to cooperate in

> discovery is a sanction of last resort that may be imposed only if the court concludes that a party's failure to cooperate in discovery is due to willfulness, bad faith or fault.

In Taylor v. Medtronics, Inc., 861 F.2d 980 (6th Cir. 1988), the court upheld the district court's imposition of discovery sanctions. In that case, plaintiff's counsel repeatedly failed to comply with the court's orders to compel discovery from plaintiff's expert. As a sanction, the court ordered that the affidavit of plaintiff's expert be stricken from the record. The court granted defendant's motion for summary judgment finding that, in the absence of any expert opinion which would support plaintiff's claims, there was no issue of material fact in dispute and defendant was entitled to judgment as a matter of law.

The court noted that the appellate court reviews this issue under the abuse of discretion standard, even when the ultimate sanction of dismissal is imposed. "[I]f a party has the ability to comply with a discovery order and does not, dismissal is not an abuse of discretion." Id. at 985 (quoting Regional Refuse Systems v. Inland Reclamation Co., 842 F.2d 150, 154 (6th Cir. 1988)). Dismissal as a sanction for failure to comply with discovery orders has been upheld by the United States Supreme Court "because it accomplishes the dual purposes of punishing the offending party and deterring similar misconduct by future litigants." Id. at 986 (citing National Hockey League v. Metropolitan Hockey Club, 427 U.S. 639, 642-43, 96 S.Ct. 2778, 2780-81, 49 L.Ed.2d 747 (1976)).

The Sixth Circuit set out the test to be applied in reviewing a court's imposition of sanctions.

> Among the factors to be considered in reviewing the imposition of sanctions for an abuse of discretion, the appellate court should consider: (1) whether the adversary was prejudiced by the dismissed party's failure to cooperate in discovery, (2) whether the dismissed party was warned that failure to cooperate could lead to dismissal, and (3) whether less drastic sanctions were imposed or considered before dismissal was ordered.

861 F.2d at 986 (citation omitted).

A review of the record reveals that plaintiff has been prejudiced by defendants' repeated attempts to obstruct discovery in this case. The record further reveals that defendants were warned that failure to cooperate in discovery could result in imposition of the ultimate sanction (R&R page 4). The

record also shows that less drastic sanctions have been imposed on defendants in this case for previous attempts to obstruct discovery.

Defendants made several written objections. The objections are that: Mr. Lees suffered from prostate problems and was scheduled for surgery in March, 1991, which was later found to be unnecessary. In addition, Mr. Lees had several drinks just prior to the scheduled inspections. Defendants argue that these emotional pressures served to undermine his ability to cooperate. Defendants also assert that Encore has otherwise cooperated in plaintiff's "recent" discovery requests. Finally, defendants assert that Rule 37(d) sanctions are improper.

The defendants are willing to propose the following alternative to sanctions:

(a) that defendant Encore provide an operating unit for inspection within the next few days, to be ordered by the court; (b) that defendant Encore assume the cost of setting up and operating the unit which is in excess of one thousand dollars; and (c) defendant Encore will not oppose case dispositive sanctions if the proposed inspection of an operating unit does not occur for reasons within Encore's control.

The court first notes that the magistrate judge recommended sanctions pursuant to Fed. R. Civ. P. 37 (b)(2)(c), not Rule 37(d). The court finds the balance of defendants' written objections unpersuasive in either explaining or excusing defendants' conduct.

The court held a hearing on this matter. At this hearing, defendants raised several other objections.

Defendants assert that the previous instances of discovery obstruction in this case were based upon the conduct of defendants' prior counsel, Mr. Durant. Defendants argue that because Mr. Durant is no longer counsel, that discovery will proceed more smoothly in the future. The court notes that at the time of the attempted inspection, Mr. Durant was already out of the case and current counsel was in place. In light of the record in this case, the court is unwilling to lay blame solely at the feet of Mr. Durant for the discovery problems in this case.

Defendants next argue that there was no order compelling the inspection and, in the absence of such an order, sanctions are inappropriate. The court notes that at the discovery status conference, the

magistrate judge directed that the inspection be conducted within two weeks. Because the inspection was scheduled at the direction of the magistrate judge, it constitutes an order of the court. If defendants were dissatisfied with this order, it was incumbent upon them to appeal to the district judge, which they did not do.

Finally, defendants argue that default can only be entered against defendant Encore, as the inspection was noticed to that defendant only. The notice of inspection was not, in fact, noticed only to defendant Encore. Rather, the caption lists all three defendants: Encore Systems, Vanguard Industrial Plastics, and George R. Lees. Plaintiff argues that there is no difference between Encore and Vanguard, and that these

defendants have always acted as one in the litigation. Defendants offer nothing which serves to distinguish between the defendants, and offers no other reason that default should not be entered as to all three defendants. Defendants also do not dispute the active role of Mr. Lees.

The record reveals that defendant Encore Systems is a Michigan corporation and George Lees is listed as its resident agent. According to its annual report, it is engaged in research and development concerning gas injection plastic molding techniques. George Lees is active in and controls a number of corporations including both Vanguard and Encore. Vanguard and Encore have a common business address and Mr. Indra Baxi's paychecks from his employment with Encore were issued to him by Vanguard Industrial

Plastic. The attempted inspection was to be conducted at the place of business of Vanguard.

The court finds that all three defendants acted together in obstructing discovery in this case and that any default is appropriately entered against all three. The court agrees with the magistrate judge that defendants' conduct was willful and that there is an appropriate legal and factual basis for the imposition of case dispositive sanctions. Defendants' conduct in this case evidences their complete disregard for the orders of the court and for the orderly conduct of litigation. For the reasons stated herein, and for those stated on the record at the hearing held on January 21, 1992,

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

MICHAEL LADNEY,

Plaintiff, Case No. 89-CV-73762-DT

vs.

HON. BARBARA K. HACKETT

ENCORE SYSTEMS, INC., VANGUARD INDUSTRIAL PLASTICS, INC., GEORGE R. LEES,

Defendants.
_____/

ENTERED: January 31, 1992

ORDER ADOPTING THE REPORT AND RECOMMENDATION OF THE MAGISTRATE JUDGE AND GRANTING PLAINTIFF'S MOTION FOR A DEFAULT JUDGMENT AS A DISCOVERY SANCTION

On March 15, 1991, Magistrate Judge Charles Binder filed a report and recommendation on plaintiff's motion for sanctions for defendants' refusal to provide discovery. The report and recommendation details the problems with discovery in this case. The parties had

agreed at a discovery status conference to inspection of a gas injection molding process, with costs of the inspection to be covered by plaintiff. Magistrate Judge Binder directed that the inspection be conducted within the next two weeks. The inspection was scheduled. The magistrate judge describes what happened at the inspection:

> At the appointed time, counsel for plaintiff, the expert, Mr. Hendry and Mr. Ladney appeared at the Encore facility for the purposes of inspection. Counsel for the defendant informed plaintiff's party that Mr. Lees would be delayed. In fact, he was, and Lees arrived approximately 15 minutes after the appointed time. At that point, all parties proceeded to the plant floor. As they approached the production area, it was noted that although some necessary components, including gas equipment, were present, the gas injection molding machine, a large apparatus, which included the parts at issue in this case, and without which a demonstration could not take

> place, was not in the plant. Plaintiff's party at that point refused to go further. Counsel and clients engaged in conversation. As it developed, the conversation took place at slightly different spots, counsel talking together in one area and approximately 15 feet away, the parties and Mr. Hendry were in a separate group. As counsel were talking among themselves, they noted increasingly heated exchanges between the parties. Mr. Ladney and Mr. Hendry, via affidavits, . . . state that there were threats of physical violence made by Mr. Lees to Mr. Ladney.

This was not, however, the first instance of obstruction of discovery by defendants in this case. In the report and recommendation, the magistrate judge stated that "[t]his case has been marked by some of the most protracted contentious discovery proceedings I have thus far witnessed in my years as a judicial officer." Defendants have twice previously been sanctioned for willful misconduct in the discovery process. The

magistrate judge concluded that this episode was another willful attempt to obstruct crucial discovery on the part of defendants and, in light of the history of the case, any sanctions less than case dispositive were no longer appropriate. The magistrate judge recommended, pursuant to Fed.R.Civ.P. 37(b)(2)(c), that plaintiff's motion for sanctions be granted and that a default judgment be entered.

Defendants filed objections to the report and recommendation. Plaintiff requested an opportunity to respond, which the court granted, and plaintiff has responded.

A review of a case dispositive report and recommendation of a magistrate judge is de novo. Local Rule C-4(b). Federal

Rule of Civil Procedure 37(b) provides in pertinent part:

> (2) If a party or an officer, director, or managing agent of a party . . . fails to obey an order to provide or permit discovery, including an order made under subdivision (a) of this rule or Rule 35, or if a party fails to obey an order entered under Rule 26(f), the court in which the action is pending may make such orders in regard to the failure as are just, and among others the following:
>
> > (C) An order striking out pleadings or parts thereof, or staying further proceedings until the order is obeyed, or dismissing the action or proceeding or any part thereof, or rendering a judgment by default against the disobedient party.

In Patton v. Aerojet Ordnance co., 765 F2d 604, 607 (6th Cir. 1985), the court stated:

> Dismissal of an action for failure to cooperate in

> discovery is a sanction of last resort that may be imposed only if the court concludes that a party's failure to cooperate in discovery is due to willfulness, bad faith or fault.

In Taylor v. Medtronics, Inc., 861 F.2d 980 (6th Cir. 1988), the court upheld the district court's imposition of discovery sanctions. In that case, plaintiff's counsel repeatedly failed to comply with the court's orders to compel discovery from plaintiff's expert. As a sanction, the court ordered that the affidavit of plaintiff's expert be stricken from the record. The court granted defendant's motion for summary judgment finding that, in the absence of any expert opinion which would support plaintiff's claims, there was no issue of material fact in dispute and defendant was entitled to judgment as a matter of law.

The court noted that the appellate court reviews this issue under the abuse of discretion standard, even when the ultimate sanction of dismissal is imposed. "[I]f a party has the ability to comply with a discovery order and does not, dismissal is not an abuse of discretion." Id. at 985 (quoting Regional Refuse Systems v. Inland Reclamation Co., 842 F.2d 150, 154 (6th Cir. 1988)). Dismissal as a sanction for failure to comply with discovery orders has been upheld by the United States Supreme Court "because it accomplishes the dual purposes of punishing the offending party and deterring similar misconduct by future litigants." Id. at 986 (citing National Hockey League v. Metropolitan Hockey Club, 427 U.S. 639, 642-43, 96 S.Ct. 2778, 2780-81, 49 L.Ed.2d 747 (1976)).

The Sixth Circuit set out the test to be applied in reviewing a court's imposition of sanctions.

> Among the factors to be considered in reviewing the imposition of sanctions for an abuse of discretion, the appellate court should consider: (1) whether the adversary was prejudiced by the dismissed party's failure to cooperate in discovery, (2) whether the dismissed party was warned that failure to cooperate could lead to dismissal, and (3) whether less drastic sanctions were imposed or considered before dismissal was ordered.

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A review of the record reveals that plaintiff has been prejudiced by defendants' repeated attempts to obstruct discovery in this case. The record further reveals that defendants were warned that failure to cooperate in discovery could result in imposition of the ultimate sanction (R&R page 4). The

record also shows that less drastic sanctions have been imposed on defendants in this case for previous attempts to obstruct discovery.

Defendants made several written objections. The objections are that: Mr. Lees suffered from prostate problems and was scheduled for surgery in March, 1991, which was later found to be unnecessary. In addition, Mr. Lees had several drinks just prior to the scheduled inspections. Defendants argue that these emotional pressures served to undermine his ability to cooperate. Defendants also assert that Encore has otherwise cooperated in plaintiff's "recent" discovery requests. Finally, defendants assert that Rule 37(d) sanctions are improper.

The defendants are willing to propose the following alternative to sanctions:

(a) that defendant Encore provide an operating unit for inspection within the next few days, to be ordered by the court; (b) that defendant Encore assume the cost of setting up and operating the unit which is in excess of one thousand dollars; and (c) defendant Encore will not oppose case dispositive sanctions if the proposed inspection of an operating unit does not occur for reasons within Encore's control.

The court first notes that the magistrate judge recommended sanctions pursuant to Fed. R. Civ. P. 37 (b)(2)(c), not Rule 37(d). The court finds the balance of defendants' written objections unpersuasive in either explaining or excusing defendants' conduct.

The court held a hearing on this matter. At this hearing, defendants raised several other objections.

Defendants assert that the previous instances of discovery obstruction in this case were based upon the conduct of defendants' prior counsel, Mr. Durant. Defendants argue that because Mr. Durant is no longer counsel, that discovery will proceed more smoothly in the future. The court notes that at the time of the attempted inspection, Mr. Durant was already out of the case and current counsel was in place. In light of the record in this case, the court is unwilling to lay blame solely at the feet of Mr. Durant for the discovery problems in this case.

Defendants next argue that there was no order compelling the inspection and, in the absence of such an order, sanctions are inappropriate. The court notes that at the discovery status conference, the

magistrate judge directed that the inspection be conducted within two weeks. Because the inspection was scheduled at the direction of the magistrate judge, it constitutes an order of the court. If defendants were dissatisfied with this order, it was incumbent upon them to appeal to the district judge, which they did not do.

Finally, defendants argue that default can only be entered against defendant Encore, as the inspection was noticed to that defendant only. The notice of inspection was not, in fact, noticed only to defendant Encore. Rather, the caption lists all three defendants: Encore Systems, Vanguard Industrial Plastics, and George R. Lees. Plaintiff argues that there is no difference between Encore and Vanguard, and that these

defendants have always acted as one in the litigation. Defendants offer nothing which serves to distinguish between the defendants, and offers no other reason that default should not be entered as to all three defendants. Defendants also do not dispute the active role of Mr. Lees.

The record reveals that defendant Encore Systems is a Michigan corporation and George Lees is listed as its resident agent. According to its annual report, it is engaged in research and development concerning gas injection plastic molding techniques. George Lees is active in and controls a number of corporations including both Vanguard and Encore. Vanguard and Encore have a common business address and Mr. Indra Baxi's paychecks from his employment with Encore were issued to him by Vanguard Industrial

Plastic. The attempted inspection was to be conducted at the place of business of Vanguard.

The court finds that all three defendants acted together in obstructing discovery in this case and that any default is appropriately entered against all three. The court agrees with the magistrate judge that defendants' conduct was willful and that there is an appropriate legal and factual basis for the imposition of case dispositive sanctions. Defendants' conduct in this case evidences their complete disregard for the orders of the court and for the orderly conduct of litigation. For the reasons stated herein, and for those stated on the record at the hearing held on January 21, 1992,

IT IS ORDERED that the magistrate judge's report and recommendation is hereby accepted as the findings and conclusions of the court.

IT IS FURTHER ORDERED that a default judgment enter against defendants Encore System, Inc., Vanguard Industrial Plastics, Inc., and George R. Lees and in favor of plaintiff.

/s/
BARBARA K. HACKETT
United States District Judge

Dated: January 31, 1992

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

MICHAEL LADNEY,

Plaintiff, CIVIL ACTION
NO. 89-CV-30032-PH

v

JUDGE JAMES HARVEY
MAGISTRATE JUDGE CHARLES BINDER

ENCORE SYSTEMS, INC.
INDUSTRIAL PLASTICS, INC.,
GEORGE R. LEES, STORK PLASTICS
MACHINERY B.V. and VERENIGDE
MACHINEFABRIEKEN STORK N.V.,

Defendants.
_____/

ENTERED: March 15, 1991

MAGISTRATE JUDGE'S REPORT AND RECOMMENDATION ON PLAINTIFF'S MOTION FOR SANCTIONS FOR DEFENDANTS' REFUSAL TO PROVIDE DISCOVERY

I. INTRODUCTION

Pending, pursuant to an Order of Reference from United States District Judge James Harvey, is Plaintiff's Motion for Sanctions for Defendants' Refusal to Provide Discovery. Oral argument was heard in Bay City on March 11, 1991.

Plaintiff seeks a finding that there has been willful violation of discovery orders and that case dispositive sanctions in the form of default judgment enter. At issue specifically is an inspection of a gas injection plastic molding process, scheduled to take place February 20, 1991 at the Encore facility in East Detroit.

All parties throughout the pendency of this case have acknowledged that this inspection is a crucial part of discovery. During earlier depositions of Mr. Lees (shown as Exs. A and B to the Motion), he expressed no direct opposition to such an inspection, although he stated that he could not cover costs. During a status conference, it was agreed that costs of inspection would be covered by the plaintiff. Shortly before the

inspection, in a letter dated February 19, 1991, counsel for the plaintiff, through Mr. Tuttle, confirmed the scheduling of the inspection at the Encore facility. (Ex. F to Motion). By a facsimile letter dated later the same day, Mr. Moga, current counsel for defendant, stated in part, "First, your understanding about the present inspection is correct." (Ex. G. to Motion).

At the appointed time, counsel for plaintiff, the expert, Mr. Hendry and Mr. Ladney appeared at the Encore facility for the purposes of the inspection. Counsel for the defendant informed plaintiff's party that Mr. Lees would be delayed. In fact, he was, and Lees arrived approximately 15 minutes after the appointed time. At that point, all parties proceeded to the plant floor. As

they approached the production area, it was noted that although some necessary components, including gas equipment, were present, the gas injection molding machine, a large apparatus, which included the parts at issue in the case, and without which a demonstration could not take place, was not in the plant. Plaintiff's party at that point refused to go further. Counsel and clients then engaged in conversation. As it developed, the conversations took place at slightly different spots, counsel talking together in one area and approximately 15 feet away, the parties and Mr. Hendry were in a separate group. As counsel were talking amongst themselves, they noted increasingly heated exchanges between the parties. Mr. Ladney and Mr. Hendry, via affidavits, (Exs. H and I to Motion),

state that there were threats of physical violence made by Mr. Lees to Mr. Ladney. Thereupon, as counsel for plaintiff was exiting the area, he placed a phone call to my office. Mr. Tuttle described to me in brief terms the circumstances and asked questions which I perceived to be a request for direction. I directed that the parties' concerns be placed in writing, and this motion followed.

This case has been marked by some of the most protracted contentious discovery proceedings I have thus far witnessed in my years as a judicial officer. Exhibits J through O document a series of discovery orders. In October 1989, I denied a request by plaintiff for sanctions, having not been convinced at that time that willful conduct had taken place. (Ex. J to Motion). Five months

later, defendants' predecessor counsel's repeated failure to respond to discovery requests led to a finding that sanctions were appropriate, although the sanctions were levied at that time in the form of a mandatory protective order (Ex. K to Motion.) Two months later, I again found willful conduct on the part of defendants' predecessor counsel (Ex. L). At that time, I stated, "I now find that Defendant Encore made no effort to comply with the discovery order until the day of this hearing, at which time Encore's counsel presented a group of documents to counsel for plaintiff. The documents were not correlated as to which parts of the interrogatories and requests for production the documents are responsive towards." (Ex. L, p. 2). Counsel further admitted that other documents were

missing. I therefore levied sanctions in the form of attorney fees and costs. This order was affirmed on appeal by Judge Harvey. (Ex. M). Plaintiff's predecessor counsel failed to pay these sanctions as required, an action which necessitated a further order by Judge Harvey. (Ex. N).

By the latter months of 1990, focus of discovery disputes had turned to depositions. On August 30, 1990, the parties were ordered to conduct the deposition of Mr. Baxi. (Ex. O to Motion). The parties were again warned that willful obstruction of this deposition would lead to the imposition of case dispositive sanctions. Id. This warning was repeated and yet another order issued relating to the Baxi deposition. (Ex. P to Motion). With the presence of current defense counsel in the latter

months of 1990, discovery appeared at last to be moving ahead. However, for the reasons which follow, I am forced now to conclude that willful attempts to obstruct the progress of crucial discovery have again been undertaken by defendant Encore. Moreover, in light of this past history, sanctions less than those of a case dispositive nature are, I suggest, no longer appropriate.

This case is presently scheduled for trial on Judge Harvey's 1991 trailing docket. It is amongst the first jury cases set for trial on or after June 3, 1991. Discovery is presently scheduled to terminate April 15, 1991. This case has been plagued by repeated attempts by defendants to obstruct discovery. The incidents described above, I suggest, are not only the most recent, but also the

most egregious. All parties knew that this discovery was crucial. Defendant Encore has already conducted a process demonstration of the machine at issue for the benefit of its own experts, outside the presence of plaintiff's expert witnesses.

Threfore(sic), on the basis of the evidence presented, I can reach no other conclusion but that Mr. Lees, Encore's principal, knew of the inspection, knew of its necessity and nonetheless authorized his lawyer to invite plaintiff's party to a demonstration which Mr. Lees knew could not take place by reason of the fact that machinery absolutely necessary for the demonstration was not physically present within Encore's facility. Counsel for defendant argues that there was not

willfulness, as Mr. Lees' financial condition necessitated plaintiff's payment of expenses prior to the demonstration. I find no basis on the evidence presented, nor upon the pleadings, for reaching such a conclusion. The subject of this inspection has been an ongoing matter of discussion between counsel for at least six months. To suggest at this late stage that Encore could not have presented the details of its financial requirements to plaintiff earlier is, I suggest, fallacious. For these reasons, I am compelled to conclude that there has been a willful and knowing obstruction of discovery, and I have no choice at this stage but to recommend the imposition of case dispositive sanctions against the defendant and in favor of the plaintiff.

In making this recommendation, I must make clear that I do not believe that the fact that the plaintiff's party was detained for a few minutes, or the fact that arguably threatening conduct took place, serves as any basis for my recommendation. Instead, I conclude that it was a knowing refusal by Mr. Lees to have the machinery in a position whereby the demonstration agreed upon by counsel, and obviously known to Mr. Lees, could take place. Mr. Lees was aware that the cost would be covered by the plaintiff.

Although there has been considerable prior activity in this case revolving around the conduct of predecessor defense counsel, I cannot find willful misconduct on the part of current defense counsel. Nonetheless, I cannot say that the conduct that did take place

is anything other than willful, and under the circumstances, can justify anything less than the imposition of case dispositive sanctions.

II. RECOMMENDATION

Accordingly, for the reasons stated hereinabove, **IT IS RECOMMENDED** that Plaintiff's Motion for Sanctions be **GRANTED** and that pursuant to Fed. R. Civ. P. 37(b)(2)(C), a default judgment enter against the defendant and in favor of the plaintiff.

III. REVIEW

The parties to this action may object to and seek review of this Report and Recommendation within ten (10) days of service of a copy hereof as provided for in 28 U.S.C. section 636(b)(1)(C).

Pursuant to Rule C-4(a) of the Local Rules of the United States District Court for the Eastern District of Michigan, a copy of any objections is to be served upon this Magistrate Judge. Failure to file objections constitutes a waiver of any further right of appeal. United States v. Walters, 638 F.2d 947 (6th Cir. 1981), Thomas v. Arn, 474, U.S. 140, 1065 S.Ct. 466, 88 L.Ed.2d 435 (1985).

/s/
CHARLES E. BINDER
United States Magistrate Judge

DATED: March 15, 1991